IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. 823 [illegible]51

JOHN W. KEOGH,

*Petitioner,*

*vs.*

CHICAGO & NORTH WESTERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *et al.*,

*Respondents.*

PETITION FOR CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF FOR RESPONDENTS.

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BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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PETITION FOR CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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## BRIEF FOR RESPONDENTS.

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### I.

CERTIORARI IS NOT THE PROPER MODE OF REVIEW.

Petitioner brought suit in the District Court of the United States for the Northern District of Illinois, for $125,000 damages, under Section 7 of the Sherman Anti-Trust Act. Defendants filed pleas of the general issue and special pleas. Plaintiff demurred to the special pleas. The District Court overruled the demurrers and plaintiff elected to stand by same. Judgment was en-

tered in favor of defendants. Plaintiff took the case on error to the United States Circuit Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed the judgment of the District Court.

The case does not fall within the provisions of Section 128 of the Judicial Code and Section 241 of the Judicial Code provides for review in this court on writ of error. Therefore certiorari is not applicable. (*U. S.* v. *Beatty*, 232 U. S. 463, 466.)

Section 240 of the Judicial Code provides for review by certiorari in any case in which the judgment or decree of the Circuit Court of Appeals is made final. (36 Stat. L. 1157.)

Section 128 of the Judicial Code provides that the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction of the District Court is dependent entirely upon diversity of citizenship, and in all cases arising under the patent, trade-mark, copyright, revenue, or criminal laws, Federal Employers' Liability Act, Hours of Service Act, Safety Appliance Acts, and in bankruptcy and admiralty cases. (36 Stat. L. 1133, as amended by 38 Stat. L. 803 and 39 Stat. L. 727.)

This suit did not arise under any laws specified in Section 128 and the jurisdiction of the District Court was not dependent on diversity of citizenship. The judgment of the Circuit Court of Appeals is not made final by Section 128.

Section 241 of the Judicial Code provides that in any case, civil or criminal, in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of the code, there shall be, of right, an

appeal or writ of error to the Supreme Court, where the matter in controversy shall exceed $1,000, besides costs. (36 Stat. L. 1157.)

This judgment is reviewable only by writ of error, under Section 241 of the Judicial Code, and the writ of certiorari is not applicable. (*U. S.* v. *Beatty, supra.*)

## II.

EVEN IF CERTIORARI WERE THE PROPER MODE OF REVIEW, THE WRIT SHOULD NOT BE ALLOWED IN THIS CASE. THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS WAS MANIFESTLY RIGHT.

Petitioner says (p. 30 petition):

> "The court did not pass upon the question as to whether or not the defendants were guilty of conspiracy under the antitrust law."

On the record, that question was not presented. The charge of conspiracy was denied by defendants' pleas of the general issue. The issue of fact made by those pleas was not tried in the District Court, as the case was disposed of on plaintiff's demurrers to defendants' special pleas.

The suit was for private pecuniary injury to plaintiff, under Section 7 of the Sherman Law. Pecuniary loss to plaintiff, as distinguished from injuries suffered by him in common with the general public, was the basis of the cause of action. Plaintiff's declaration alleged that such pecuniary injury resulted to plaintiff from the payment and collection of "uniform, arbitrary, noncompetitive and unreasonable freight rates." The special pleas in substance averred that plaintiff had had a long series of disputes with the carriers over interstate rates on excel-

sior and flax tow; that the matter had been repeatedly submitted to the Interstate Commerce Commission in proceedings instituted by plaintiff before that body*; that the Commission had thoroughly investigated all the rates alleged by plaintiff in this lawsuit to be "uniform, arbitrary, noncompetitive and unreasonable" and had found all of said rates reasonable; that all rates paid by plaintiff, the payment of which was alleged in this suit to have been the cause of the supposed damages, were the same rates specifically approved and ordered enforced by the Interstate Commerce Commission.

The theory of the special pleas was that the Interstate Commerce Commission has exclusive jurisdiction to determine when interstate freight rates are unreasonable and that its findings and orders in the Keogh rate cases were conclusive; that the statutory obligations to pay and collect the rates approved by the Interstate Commerce Commission and duly published and filed as required by the law, could not be avoided under the pretense that the collection of such rates, lawful under the Interstate Commerce Act, constituted a wrongful act, giving a cause of action for damages under any other statute; that in order to allow plaintiff damages it would be necessary not only for the court and jury to find that the rates approved by the Interstate Commerce Commission were unreasonable, but also necessary for the court and jury to fix, by pure speculation, what interstate rates *might have been;* that the result of a recovery by plaintiff would be a rebate from the tariff rates, which the law required him to pay and required the carriers to collect, and which had been paid by all other shippers; that if plaintiff had sustained any injury from

*John W. Keogh* v. *C. B. & Q. R. R. Co.* 24 I. C. C. 606; *John W. Keogh* v. *M. St. P. & S. S. M. Ry. Co.* 26 I. C. C. 73; Rates on Excelsior and Flax Tow from St. Paul, Minnesota, 29 I. C. C. 640; The Excelsior and Flax Tow Cases, 36 I. C. C. 349.

the exaction of unreasonable freight charges, the Interstate Commerce Commission had exclusive power to relieve the plaintiff from the controlling effect of the tariffs and to award him reparation for all damages sustained because of the payment of such rates.

The District Court held that the special pleas set up a good defense and its judgment has been affirmed by the Circuit Court of Appeals. Opinion of the Court of Appeals is appended hereto. Obviously this case is controlled by *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* 204 U. S. 426, and the long line of decisions of this Court following the Abilene case, by which it has been settled that the question of the reasonableness of interstate freight rates is committed to the exclusive jurisdiction of the Interstate Commerce Commission and cannot be relitigated in the courts.

Throughout this lawsuit plaintiff has placed great reliance on *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, and *United States* v. *Joint Traffic Association,* 171 U. S. 505. Those cases were suits for dissolution *by the Government,* under Section 4 of the Sherman Law. The rates were not in question and had not been passed upon by the Interstate Commerce Commission, even under its then limited authority over rates. This suit is by an *individual,* for specific pecuniary loss; the charge of conspiracy was not tried, but the case turned solely upon plaintiff's claim of pecuniary damage *from the rates.* All the rates in question had been specifically approved and ordered enforced by the Interstate Commerce Commission. It may be, as plaintiff thought, that the Commission was mistaken each time as to the reasonableness of these rates, but nevertheless Congress has committed that question to the exclusive jurisdiction of the Commission and its

judgments cannot be reviewed in a lawsuit of this character.

Respectfully submitted,

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# APPENDIX.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 2776. OCTOBER TERM AND SESSION, 1920.

John W. Keogh,
*Plaintiff in Error,*
*vs.*
Chicago & North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, *et al.*,
*Defendants in Error.*

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before BAKER and ALSCHULER, *Circuit Judges,* and FITZHENRY, *District Judge.*

This writ of error was sued out by plaintiff to reverse the judgment in favor of the defendant in the District Court. He brought his action to recover three-fold damages under the provisions of the Sherman Anti-Trust Act. The declaration alleges in substance that on September 1st, 1912, and for several years prior, plaintiff was engaged in the business of manufacturing and selling excelsior and tow, with his principal office and place of business in Chicago; from 1909 to the date of the commencement of this suit he owned and operated a mill at St. Paul, Minnesota, where he manufactured his products and shipped them to various consignees in interstate trade and commerce within the meaning of the Act of Congress of July 2nd, 1890, entitled, "An Act to Pro-

tect Trade and Commerce Against Unlawful Restraints and Monopolies." The defendant corporations, during the same time, were common carriers, engaged in interstate commerce from St. Paul to various points. The individual defendants are the officers, agents and employees of the defendant corporations. It is charged that after September 1, 1912, plaintiff paid large sums of money to the various carriers for transporting his products from St. Paul; that the defendant corporations, at their expense, maintained an association known as "The Western Trunk Line Committee"; that the members of the association were competing carriers in interstate commerce and the object of the association is to agree upon, fix, maintain and publish uniform, arbitrary and noncompetitive freight rates to competing points; that one of the rules of the association requires the unanimous vote of all members to fix or change a freight rate and all members must abide by the decision of the association and maintain the freight rates so fixed. Any member failing to maintain the rates, so fixed, shall be expelled or suffer other penalties; that the committee met from time to time in Chicago and agreed upon, fixed, maintained and published freight rates to various points in several states, and the rates so fixed were arbitrary, uniform, unreasonable, and non-competitive and not based on what would be a fair remunerative rate to the carriers transporting such freight; and that it maintained and published such rates in violation of the Anti-Trust Act of Congress; that thereby all competition for the transportation of excelsior and tow from St. Paul was destroyed and the rates agreed upon maintained; that defendants during the period unlawfully conspired to and did restrain trade and commerce among several states, contrary to the statute; and by reason of the conspiracy plaintiff had been injured in his business and property,

in that the freight rates which defendants collected for the transportation of excelsior and tow from the plaintiff were greatly increased over the freight rates which would have been charged and collected if no such conspiracy had been entered into, setting forth a detailed statement of shipments made by the plaintiff from St. Paul to various points between September 1, 1912, and the date of the commencement of this suit; that the defendant corporations embraced all the common carriers running out of St. Paul, and it was necessary for him to patronize all or some of the defendants; that the consequence of the conspiracy was that plaintiff's profits during the time in question were reduced to the extent of the difference between the rate that would have existed had it not been for the conspiracy and the rates collected as a result thereof.

The second count charges that from September 1, 1912, the defendants carried on their business in accordance with the plans adopted by The Western Trunk Line Committee and all competition as to rates for the transportation of excelsior and tow from St. Paul which had theretofore existed was prevented and destroyed by the fixing of the rates which were greatly in excess of the freight rates which but for the conspiracy would have prevailed. That in 1909 and 1910 plaintiff built a tow and excelsior mill at St. Paul at great expense and prior to September 1, 1912, he had shipped 9,000 tons of his products per year, and that his net profit on Chicago shipments was $1 per ton; that after that date, defendants increased freight rates on his products from St. Paul to Chicago and other points; that the rates were not competitive and were the result of the combination and conspiracy, and all competition on the freight rates was destroyed. By reason of the alleged unlawful rates and in consequence of the conspiracy, the net profits of

the plaintiff on excelsior and tow manufactured by him, decreased from $1 per ton to 30c per ton; that the contract and combination was in restraint of trade and commerce, contrary to the provisions of the statute.

Defendants filed separate pleas of the general issue and notices of special matters to be shown in defense. The special matters set up in the notices were in substance that the rates complained of in the declaration were those that were subject to the jurisdiction of the Interstate Commerce Commission; that in the months of September, October, November and December, 1912, the defendants filed schedules or tariffs with the Interstate Commerce Commission, which were published as required by law, and carried the rates on excelsior and tow mentioned in the declaration; that the plaintiff had filed his complaint with the Interstate Commerce Commission, which, upon a hearing, held that the rates from St. Paul to Chicago were reasonable and that the rates from St. Paul to interstate destinations other than Chicago were lawful in so far as they did not represent advances over previous interstate rates of more than 3½c per 100 pounds. Plaintiff filed his application for a rehearing, which was denied; later, he filed a second petition to have the case reopened, for the purpose of considering whether carload rates on a 30,000 lb. minimum basis on plaintiff's products should be made lower than rates fixed by the Commission upon a 20,000 lb. minimum basis. Upon a hearing, the rates as fixed upon the prior hearing, were permitted to stand by the Commission. Afterwards, defendants filed amended and modified schedules, applying to these products, from St. Paul to St. Louis, Missouri, Des Moines, Iowa, and other destinations, which were in accordance with the findings and report of the Commission. All the tariffs and schedules

of which the plaintiff complains have been found by the Commission to be reasonable and lawful.

In the progress of the trial in the court below, the Court intimated that in its judgment the special matters referred to in the notices, if proved, would be a bar to the action. By agreement, the jury was discharged, the special matters set forth in the amended notices were considered as having been well pleaded in one or more special pleas to the declaration, and the reports and orders of the Interstate Commerce Commission in the tow and excelsior cases should be considered as having been set forth and incorporated in the special pleas; that a general demurrer to each of said special pleas be interposed on the ground that the facts alleged in the said special pleas do not constitute a defense at law. The Court thereupon overruled the demurrers. Plaintiff elected to stand by his demurrers, the suit was dismissed and judgment rendered against the plaintiff for costs.

FitzHenry, *District Judge,* delivered the opinion of the Court.

Plaintiff in error seeks to set aside the judgment of the District Court against him in his action for damages against the defendants under Section 7 of the Sherman Anti-Trust Act, upon the ground that the trial court erred in holding the fact that the freight rates charged and collected by the defendants had been found to be reasonable by the Interstate Commerce Commission was a defense to the action, and overruled plaintiff's demurrers to the defendants' pleas setting out the proceedings had before the Commission.

If the plaintiff had a remedy in the premises it was by virtue of Sec. 7, *supra,* which provides:

> "Any person *who shall be injured in his business or property* by any other person or corporation by

> reason of anything forbidden or declared by this act may sue therefor * * * and shall recover three-fold the damages *by him sustained* * * *." (Italics ours.)

Under this statute those who may sue for three-fold damages by virtue of its terms are limited to those "who shall be injured in his business or property," and if a recovery is permitted it must be limited to the damages "by him sustained." *Pennsylvania Ry. Co.* v. *International Coal Co.* 230 U. S. 184. The mere fact that the defendants might have been subject to a criminal prosecution by the Government, or to corrective or coersive proceedings at the instance of the Interstate Commerce Commission is of no avail to a litigant unless it is established that he sustained pecuniary damage. *Pennsylvania Ry. Co.* v. *International Coal Co. supra; Knudsen* v. *Michigan Central R. R. Co.* 148 Fed. 968; *Meeker* v. *Lehigh Valley R. R.* 183 Fed. 548; *Central Coal & Coke Co.* v. *Hartman,* 111 Fed. 96; *Motion Picture Patents Co.* v. *E. Clair Film Co.* 208 Fed. 426; *Imperial Film Co.* v. *General Film Co.* 244 Fed. 985.

To recover under this statute plaintiff must show, as a result of the defendants' acts, actual damages were sustained. These damages must be proved by facts from which their existence is logically and legally inferable, not by conjecture nor estimates. *American Seagreen Slate Co.* v. *O'Halloran,* 229 Fed. 77; *Central Coal & Coke Co.* v. *Hartman,* 111 Fed. 96.

Plaintiff in the first count of his declaration very clearly limits his damages due to the alleged conspiracy or combination in restraint of trade to the difference between the rates that were charged by reason thereof and what the rates might have been had the alleged conspiracy not intervened, but described in the second count as having had the effect of reducing plaintiff's profits on his

products from $1 to 30c per ton. No other element of damage is suggested by the pleadings. The question is squarely presented as to whether or not railroads are culpable in damages for charging and collecting rates which have been found to be reasonable by the Interstate Commerce Commission.

A similar question was before this Court in *National Pole Co.* v. *Chicago & North Western Ry. Co.* 211 Fed. 65. In that case, upon the authority of *Texas Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* 204 U. S. 426, we held that the question of the reasonableness of a freight tariff was one which was addressed originally and exclusively under the Act to Regulate Commerce to the Interstate Commerce Commission; that this must necessarily be true from the nature of the enterprise involved. The fixing of a just rate for a common carrier for the transportation of persons and property in interstate commerce involves the exercise of a legislative discretion. In the *National Pole Co.* case, *supra,* this Court said:

> "Congress directly and in the first instance might have inquired into the character and value of the particular transportation service now under investigation by the Commission and have named the rate therefor in a statute. But, with the increasing complexities of human activities, it was impossible to cover the details of rate-making (and the same is true of many other subjects) by specific statutes; and so the board or commission form of legislation is used. That is, Congress declared the public policy and fixed the legal principles that were to control, and charged an administrative body with the duty of ascertaining within particular fields from time to time the facts on which the legal principles established by Congress would be brought into play. * * * But since the congressional prohibition of unjust rates cannot, by the terms of the act, be effective against a particular published rate, although unjust, until the Commission has investigated the service in question and has established the standard of just-

> ness for all shippers who use that service, the action of the Commission in the regulation of rates is quasi legislative—it converts the actual legislation from a static into a dynamic condition."

And this view has found lodgment in numerous expressions of the Supreme Court upon this same proposition many times since.

When plaintiff first felt aggrieved he sought his relief by the proper procedure—by filing his complaint with the Interstate Commerce Commission. *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557; and cases cited. And the finding of the Commission upon this subject was conclusive. *Skinner & Eddy Corporation* v. *United States, supra.*

Had the schedules filed in 1912 been found by the Commission to carry unreasonable and oppressive rates in violation of law, and the amount of damages sustained by reason of defendants charging and collecting the rates provided in the schedules, a different case would be presented. In such case a judicial question would be involved which might be adjudicated in a court as well as before the Commission; but inasmuch as the Commission took the contrary view, holding that the rates provided in the schedules and charged by the defendants and collected from the plaintiff for the shipments complained of were reasonable, a different situation arises.

Congress in the passage of the Act to Regulate Commerce having provided the rules of law applicable to freight charges, and, the administrative board,—Interstate Commerce Commission—having determined the rates fixed by the schedules complained of were within the statute, the plaintiff has no other alternative than to regard the rates as reasonable and as having been well established. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.* 215 U. S. 452; *Proctor & Gam-*

*ble* v. *United States,* 225 U. S. 282; *Kansas City Southern Ry. Co.* v. *United States,* 231 U. S. 423; *Interstate Commerce Commission* v. *Atchison, Topeka & Santa Fe R. R. Co.* 234 U. S. 294.

The rates in defendants' tariff schedules complained of in plaintiff's declaration having been found, by the Interstate Commerce Commission, to be reasonable, are to be treated as though they were embodied in a statute, binding as such upon both defendants and plaintiff alike. *Pennsylvania Ry. Co.* v. *International Coal Co.* 230 U. S. 184-196.

The only element of damage alleged in plaintiff's declaration being predicated upon the payment of freight rates which the plaintiff was required by law to pay and the defendants were required by law to collect, it is apparent that the special matters set out in the several pleas did present a complete defense to the action. It was therefore unnecessary to adjudicate the question as to whether or not the defendants were guilty of the crime of conspiracy under the Anti-Trust Law. If no provable damages were sustained by the plaintiff, there can be no recovery. The demurrers were properly overruled and the judgment of the District Court will accordingly be.

AFFIRMED.

NO. [redacted]51



IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

JOHN W. KEOGH,
*Plaintiff in Error,*

*vs.*

CHICAGO & NORTH WESTERN RAILWAY COMPANY, et al.,
*Defendants in Error.*

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## REPLY BRIEF FOR PLAINTIFF IN ERROR.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1921.

JOHN W. KEOGH,
*Plaintiff in Error,*
*vs.*
CHICAGO & NORTH WESTERN RAILWAY COMPANY, et al.,
*Defendants in Error.*

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## REPLY BRIEF FOR PLAINTIFF IN ERROR.

### I.

**The declaration shows that plaintiff suffered pecuniary damages, recoverable under Section 7 of the Anti-Trust Act.**

Counsel for defendants in error do not question that the acts set forth in the declaration constitute a violation of Section 1 of the Anti-Trust Act, but seek to sustain the judgment of the lower courts on the ground that plaintiff in error suffered no pecuniary damage. The declaration alleges that as the direct result of the unlawful acts of the defendants, plaintiff was injured in his business and suffered damages and specifies particularly the nature of the damages.

Several cases are cited by defendants in error to the effect that the damages must be proved and not guessed at. The question of proof is not involved in this case. As said by the Court of Appeals in *Thomsen* v. *Union Castle Mail S. S. Co.*, 166 Fed. 251:

> "It may be that the plaintiffs will be unable to establish the essential elements of the claim for damages which they set up. But they are entitled to their opportunity—to their full day in court."

In that case the suit was dismissed before all the plaintiff's evidence was in. The declaration in that case contained only a general allegation of damages. The case is reported in this Court as *Thomsen* v. *Cayser*, 243 U. S., 73, wherein the judgment of the District Court in favor of the plaintiff was upheld.

In *Meeker* v. *Lehigh Valley R. Co.*, 183 Fed. 548, the Circuit Court of Appeals of the Second Circuit held that on demurrer a general allegation of damages was sufficient.

## II.

### The Interstate Commerce Act has no application to this case.

As in the Court below, counsel for defendants in error give more attention in their brief to the Interstate Commerce Act than they do to the Anti-Trust Act. They seek to confuse this action with one arising under Sections 8 or 9 of the Commerce Act. It is contended that the Commerce Act regulates rates, and therefore reference must be made to it to determine what rates are unlawful. It is argued that to permit a recovery against common carriers for such unlawful acts as set forth in the declaration would destroy the Commerce Act. There is no conflict whatever between the provisions of the Commerce Act and the Anti-Trust Act. It is said that wherever the Commerce Act applies it controls. The

same thing may be said of the Anti-Trust Act. This action is brought under the Anti-Trust Act and of necessity its provisions control. The action is not based on injury from payment of approved rates, as counsel state, but on the provisions of a statute which gives a right of action for damages to any person who suffers injury by reason of an unlawful combination or monoply. The cases cited by defendants in error relate to actions under the Commerce Act. That Act covers a different field than the Anti-Trust Act. Combinations in restraint of trade are not prohibited by the Commerce Act. Great reliance is placed by counsel for defendants in error on the *Abilene Oil case.* That was an action to recover money alleged to have been exacted from the plaintiff by the defendant in excess of a fair and reasonable rate. It involved the proper construction of the Commerce Act, and it was held that a shipper seeking reparation predicated upon the unreasonableness of an established rate must, under the Commerce Act, primarily invoke redress through the Interstate Commerce Commission. No question of conspiracy or combination of carriers in violation of the Anti-Trust Act was involved.

If the contention of defendants in error is sound, Section 7 of the Anti-Trust Act has no application to common carriers violating Sections 1 and 2 of the Act. Defendants in error, by indirection, seek such a ruling. It was urged in the *Trans-Missouri* and *Joint Traffic cases* that the Anti-Trust Act did not apply to common carriers. This Court held in those cases, and in others, that the Anti-Trust Act does apply to common carriers. In fact, this Court held, in *Thomsen* v. *Cayser,* 243 U. S. 66 that the Anti-Trust Act applied more strictly to common carriers than to others. At page 85 it is said:

> "The rule condemning the combination of defendants, indeed, must have a stricter application to it than to the combinations passed on in the cited cases."

This suit is against several individuals, as well as the corporate defendants, and any one of the individual defendants is liable for the damages resulting from the unlawful conspiracy in which he participated. It surely would not be contended that the Commerce Act exempts the individual defendants from liability under Section 7 of the Anti-Trust Act for any acts in violation of Section 1 thereof. As the result of their unlawful acts plaintiff was charged higher rates than he would otherwise have had to pay and his business was injured. The individual defendants plead as a defense that the higher rates which plaintiff was compelled to pay were held, in a proceeding before the Commission to which they were not parties, not to be in excess of the "maximum rates to be charged," under the Commerce Act. In other words, when charged with the violation of one statute they plead that a Commission found their corporate co-defendants not guilty of violating another statute.

## III.

### The findings of the Interstate Commerce Commission are not competent or material in this case.

Under the third and fourth points of their brief, defendants in error contend that the Interstate Commerce Commission has exclusive jurisdiction over freight rates, and that it alone can make findings upon which shippers may recover damages, and that such findings cannot be reviewed in this proceeding. Plaintiff in error is not seeking to review the findings of the Commission. On the other hand, we contend that such findings are inadmissible and have not the slightest bearing in a suit such as this brought under the Anti-Trust Act. Such orders can have no greater effect than provided by statute.

Section 16 of the Commerce Act provides that such order shall be *prima facie* evidence of the facts therein

stated in any proceeding in court to enforce the order of the Commission. Counsel for defendants in error have not cited any cases holding that the finding or order of the Commission is admissible in a proceeding under the Anti-Trust Act. Both the subject-matter and the cause of action in the two proceedings are different and the parties are not the same.

The argument of defendants in error amounts to this, that if two or more competitive carriers combine in violation of Section 1 of the Anti-Trust Act and fix higher rates and then separately publish such rates and file the same with the Interstate Commerce Commission and such advanced rates are not so excessive as to be condemned by the Commission, they are not liable in damages for such violation of the Anti-Trust Act. It is manifest that, if defendants in error by this method can exempt themselves from liability to an individual under Section 7 of the Anti-Trust Act, they would have a good defense to a suit by the Government, either in equity or under the criminal code, by virtue of Sections 3 and 4 of the Act. This same argument has been made before and particularly in the *Joint Traffic case*. The contention though presented ably by eminent counsel, was held by this Court to be without merit.

If, as appears by the decisions of this Court in the *Joint Traffic* and other cases, common carriers who enter into such unlawful combinations may be enjoined in equity or proceeded against criminally, or their officers imprisoned, it would seem logical that they would be liable under Section 7 for the damages caused to individuals by reason of their unlawful acts. The whole argument of defendants in error runs counter to the reasoning of this Court in the *Trans-Missouri* and *Joint Traffic cases* and many subsequent cases cited in plaintiff in error's original brief.

If a suit cannot be maintained under Section 7 of the Anti-Trust Act until application has been made to the Interstate Commerce Commission and a finding had that the rates are unreasonable, common carriers violating Section 1 of the Anti-Trust Act would be exempt from the liability provided in Section 7. The injured party would merely have a claim for reparation under the Commerce Act. His suit would be based on the award of the Commission or to recover the excess over the rates fixed by the Commission, and manifestly the provisions of the Anti-Trust Act would have no bearing. He would be proceeding under the Commerce Act for a violation thereof, and not for a violation of the Anti-Trust Act.

Counsel might as well openly ask this Court to overrule its previous decisions, or at least add a proviso to Section 7 to the effect that it does not apply to common carriers. The language of Section 7 is too clear and explicit to admit of any such contention as that made by counsel for defendants in error.

The Commerce Act was designed, as counsel states, primarily to prevent discrimination. Counsel emphasize the necessity of uniformity in rates. Each carrier should and must treat all shippers alike, but the Anti-Trust Act then enters and provides for the further protection of the public by prohibiting agreements or combinations among competing carriers for the purpose of eliminating competition among such carriers. It is designed to give shippers the benefit of free and untrammeled competition and is in no way inconsistent with the Commerce Act, nor does it cover the same field. One Act secures equal treatment by a carrier of all shippers dealing with it, while the other secures to shippers and others the benefits that may result from competition among parallel or competing lines.

Under the heading, "Statement of the Case," counsel for defendants in error make an extended argument, based on the so-called *Keogh cases*. These cases arose under the Commerce Act. The Commission expressly refused to pass on any charge involving liability under the Anti-Trust Act, just as in this case the Court is asked to refuse to pass on the rights of the parties under the Commerce Act.

The Commission did not and could not lawfully determine whether the rates would have been lower, except for the unlawful combination of the defendants. There is nothing in the Commerce Act preventing an agreement such as entered into by the defendants in this case. It was said in the *Keogh case* that while the record justified an inference that the rates in question were increased as the result of a common understanding, yet the Commission could not determine that question, but must confine itself to the one question of whether the advanced rates were reasonable. (26 I. C. C. 692.)

The report of the Commission thus clearly illustrates the distinction between a suit under the Anti-Trust Act and a proceeding under the Commerce Act. No relief could be obtained under the Commerce Act unless the rates exceeded the maximum permitted by the Commission, even though the proof established conclusively that they were increased as the direct result of an agreement to fix arbitrary and non-competitive rates in violation of the Anti-Trust Act. The carriers might admit such an agreement and yet an injured party could get no relief from the Commission or by other proceeding under the Commerce Act, simply because that Act does not purport to apply to cases involving combinations to destroy competition. In such a case, however, the party injured would have an adequate remedy by a suit for damages under Section 7 of the Anti-Trust Act. It would not be

necessary in such proceeding to show that the rates were unreasonably high. If they were increased as the direct result of the unlawful combination and plaintiff was compelled to pay the advanced rates to his loss, or his business was in any way injured, that would be sufficient to entitle him to recover. In other words, the Court and jury would have to determine how much the rates were increased by reason of the unlawful combination, whereas, in a proceeding before the Interstate Commerce Commission, the sole question is the reasonableness of the advanced rates.

Among the cases cited by defendants in error is the *Meeker case*. The opinion of the district judge, whose views were held erroneous by the Court of Appeals, is quoted at great length on pages 26 to 29 of their brief. We presume the views of the district judge are quoted at such length because that is the only opinion in the reports which tends to support the contention of defendants in error. On page 37 of our original brief, we quote from the opinion of the Court of Appeals, which clearly points out the fallacy of the views of the District Court and of defendants in error. It it said, in explaining the decision of the Court of Appeals in the *Meeker case*, that the defendant was sued as a party to an unlawful conspiracy and not as a carrier. In the case at bar, plaintiff sued not as a shipper to obtain redress as to freight rates, but to recover damages suffered by him as a direct result of certain unlawful acts on the part of the defendants, some of whom are not common carriers. The language of the Court of Appeals in the *Meeker case* (183 Fed. 551) states exactly the position of plaintiff in error in this case. The other cases cited on this subject by defendants in error do not bear upon any of the questions involved.

## IV.

### The damages alleged are not speculative.

Under their fifth brief point, defendants in error contend that the damages alleged are speculative, and that there is no definite and certain standard by which a jury can determine the damages. The Court is not in position to pass on any question of damages, or the method of proof. The declaration alleges damages and the questions discussed by counsel cannot arise until evidence is offered on the subject of damages. The special pleas, and the demurrers thereto, do not present such questions. In all the cases cited by defendants in error there were trials on the issues, and the question of the sufficiency of the evidence properly presented. This Court cannot presume that plaintiff cannot prove the damages he alleges. The rules of law governing proof of damages are no different in this case than in any suit at law to recover damages.

It is said that the jury would have to speculate as to what the competitive rates would have been, and as to whether the Interstate Commerce Commission would have upheld such rates. Counsel have confused themselves by their efforts to inject the Commerce Act and the findings of the Commission into this case. The jury would not be concerned with the Interstate Commerce Commission, and it would be error to permit the Commission's views to be given to the jury. It admits of no doubt that in a suit under Section 7 of the Anti-Trust Act the plaintiff is entitled to a jury trial.

In *Thomsen* v. *Cayser*, 243 U. S. 66, this Court in passing upon similar contentions, said (p. 88):

> "The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that

more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436, 51 L. Ed. 553, 557, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075. The unreasonableness of the rate and to what extent unreasonable was submitted to the jury, and the verdict represented their conclusion."

In a suit under Sections 8 and 9 of the Commerce Act a jury must determine the amount of the damages and may disregard the award of the Interstate Commerce Commission.

*Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412.

The damages can be as readily ascertained in this case as they could in *Chattanooga Foundry Co.* v. *Atlanta*, 203 U. S. 390, wherein the jury determined the difference between the price paid and the price that would have been paid if there had been no unlawful combination.

Many cases are cited by defendants in error, holding that a rate may be reasonable and yet create an unjust discrimination and preference. Such a proposition is obvious. Those decisions, however, do not support counsel's contention that the carriers cannot fix as low rates as they please. It is not true, as counsel state, that the Commission in the *Keogh case* found the rates too low. The Commission held that the carriers could not establish rates that were discriminatory. It said that the rates on excelsior and flax tow must be the same. The carriers had their election either to reduce the excelsior rates from 13½ cents to 10 cents, the flax tow rate, or to increase the tow rate to the excelsior rate. The Commission did not object because the rates were too low, but because the rates were discriminatory between different points or gave unjust preferences in violation of

the Commerce Act. It is not necessary to violate the Anti-Trust Act to avoid discriminatory rates. Regardless of the views of counsel for defendants in error, this Court, in *Skinner & Eddy Corporation* v. *U. S.*, 249 U. S. 557, relied upon by the Court of Appeals in its opinion, stated definitely that,

> "Railroads still have power to fix rates as low as they choose and to reduce rates when they choose."

This Court further said in that case, as quoted on page 33 of defendant in error's brief:

> "The order prohibiting the unjust discrimination, however, leaves the carrier free to continue the lower rate; the compulsion being that if the low rate is retained the rate applicable to the locality or article discriminated against must be reduced."

The declaration alleges clearly that plaintiff suffered damages and the nature and extent thereof, and that such damages were the direct result of the unlawful acts of the defendants in error. These allegations cannot be overcome by the speculations and conjectures indulged in by the learned counsel for defendants in error as to possible difficulties to be encountered by plaintiff in error in his proof on the trial of the issues.

## CONCLUSION.

Defendants in error practically admit the charges of violating Section 1 of the Anti-Trust Act. The language of Section 7 is clear and explicit that if plaintiff suffered any injury to his business or property by reason of such unlawful acts, he is entitled to recover treble the damages sustained. Defendants in error seek to escape liability by showing that their acts did not constitute a violation

of the Commerce Act. To sustain their position would nullify Section 7 of the Anti-Trust Act, so far as common carriers are concerned. This Court has frequently said that the public is entitled to the benefit of the lower rates that competition inevitably tends to bring about.

We respectfully submit that plaintiff in error, having alleged facts showing a violation of Section 1 of the Anti-Trust Act by the defendants in error, and having further alleged pecuniary loss resulting from such wrongful acts of defendants in error, is entitled to his full day in Court, which has so far been denied him.

We therefore repectfully submit that the judgments of the District Court and the Circuit Court of Appeals should be reversed and the cause remanded to the District Court with directions to sutsain the demurrers to the special pleas of the defendants.

Respectfully submitted,

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